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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1664

JOHN B. BAILEY, Individually and on Behalf of the Members of the Class Composed of Employees of Respondent, IOWA BEEF PROCESSORS, INC., At Its Mason City, Iowa, Plant, *Petitioner,*

v.

IOWA BEEF PROCESSORS, INC., *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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On the Brief

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OPINIONS BELOW

The unanimous opinion of the Supreme Court of Iowa (Pet. A13-A23) is reported at 213 N.W.2d 642. The opinion of the Iowa state trial court is unreported but is reproduced in the Appendix to the Petition for Writ of Certiorari (Pet. A10-A12).

JURISDICTION

Respondent does not question the first two sentences of the statement of the grounds on which the jurisdiction of this court is invoked as set forth in the Petition. Respondent states that it believes that Petitioner intended to state that jurisdiction is conferred on this Court by 28 USC 1257(3), rather than by 28 USC 1257(c), as stated in the Petition, but Respondent denies that jurisdiction is conferred on this Court under any provision of law, and specifically denies that any federal question of substance is involved in this action.

STATUTES INVOLVED

Respondent does not agree that Section Seven of the Clayton Act, 15 USC § 18 is involved in this case, and does not believe that any other federal statutes or regulations are involved. Respondent further believes and states that only the common law of the State of Iowa is involved in this case.

QUESTIONS PRESENTED

1. Whether in this case there is any title, right, privilege or immunity specially set up or claimed under any statute of the United States.

2. Whether the Supreme Court of Iowa has decided a federal question of substance.

3. Do the employees of Respondent at its Mason City, Iowa facility have any rights to recover from Respondent, under Iowa contract law, or otherwise, when they claim as third party beneficiaries for a breach of an "agreement" when the "agreement" is an antitrust consent decree, and the provision claimed to have been breached is that Respondent ". . . shall take

no action with respect to the personnel . . . which would impair IBP's (Respondent's) ability to accomplish the divestiture ordered in paragraph IV (A)".

STATEMENT OF THE CASE

Insofar as it deals with "The Background", "The Iowa State Court Proceeding", and "Decision of the Supreme Court of Iowa", Petitioner's Statement of the Case is substantially correct, with the understanding that the facts are those alleged in Petitioner's pleadings filed in the trial court and are not proven facts.

Presentation of the Federal Question Below.

This section of Petitioner's Statement of the case is misleading and Respondent believes and states to this Court that no federal question was presented either to the trial court or to the Supreme Court of Iowa. Moreover, the quotations set forth in the Petition (Pet. 5 & 6) are taken out of context from Petitioner's briefs to the trial court and to the Supreme Court of Iowa in a strained attempt to present a supposed federal question to this Court.

The language quoted from the brief to the trial court was in support of Petitioner's argument to the trial court that Petitioners are creditor beneficiaries within the meaning of Section 133 of the *Restatement of the Law of Contracts* as adopted by the Iowa Supreme Court in the case of *Olney* v. *Hutt,* 251 Iowa 1379, 105 N.W.2d 515 (1960). Indeed, the brief point preceding the quoted language was:

> "PLAINTIFFS ARE CREDITOR BENEFICIARIES OF THE CONTRACTUAL AGREEMENT BETWEEN THE PARTIES TO THE JUDGMENT BY CONSENT."

The language just preceding the language to the trial court quoted in the Petition is:

> "Third-party beneficiary doctrine, particularly as it has been developed in Iowa, requires an examination of the relationship between IBP, the Government, and IBP's employees."

The language quoted from Petitioner's brief to the Supreme Court of Iowa was again in support of Petitioner's argument to the Supreme Court of Iowa that Petitioners are creditor beneficiaries within the meaning of Section 133 of the *Restatement of the Law of Contracts*. The opening two sentences of the paragraph from which the quoted language was lifted are as follows:

> "The *Restatement's* formulation has been adopted by the Iowa courts. *Olney* v. *Hutt,* 251 Iowa 1379, 105 N.W. 2d 515 (1960). The proper application of these doctrines to the instant case requires an examination of the relationships among IBP, the Government, and IBP's employees." (Petitioner's Brief to Supreme Court of Iowa, page 19)

Then follows the language quoted in the Petition to show how the supposed federal question was allegedly raised. That language was quoted again in Petitioner's Reply Brief to the Supreme Court of Iowa, but contained three parenthetical additions and then read as follows:

> "In particular, was the Antitrust Division of the Department of Justice, as agent for the United States Government (the promisee), satisfying an 'actual or supposed or asserted duty' owed under Section 7 of the Clayton Act to the Mason City employees (the beneficiaries) when it obtained IBP's (the promisor) promise to 'continue the

normal operations of Blue Ribbon and take no action with respect to the personnel or assets of Blue Ribbon which would impair IBP's ability to accomplish the divestiture ordered in paragraph IV(A)'? (Petitioner's Reply Brief to the Supreme Court of Iowa, page 7)"

The language quoted in the Petition to this Court was a miniscule part of the argument contained in just over 12 pages of Petitioner's Brief to the Supreme Court of Iowa in support of a Brief Point and subpoints which were set forth as follows:

"DIVISION II

"PLAINTIFFS ARE CREDITOR BENEFICIARIES OF THE CONTRACT EMBODIED IN THE JUDGMENT BY CONSENT BETWEEN THE GOVERNMENT AND IBP.

"1. The plaintiff and the employees constituting the class represented by him are not merely incidental or collateral beneficiaries of the agreement between the United States and IBP.

"2. A person becomes a creditor beneficiary if the performance of the promise satisfies an actual or supposed or asserted duty of the promisee to the beneficiary.

"3. Neither consideration from the beneficiary nor knowledge of the contract by the beneficiary is required.

"4. The primary source for ascertaining the actual, supposed or asserted duties of the United States is the language of the federal antitrust statutes themselves.

"5. The right of private parties to recover damages as third-party beneficiaries of contracts between governmental bodies and private corporations or individuals is well established.

> "6. The plaintiff and the class of employees he represents were intended by the United States to be third-party beneficiaries of the duties owed by the United States under the antitrust laws." (Petitioner's Brief to the Supreme Court of Iowa, pp. 14-15)

From the foregoing it is readily apparent that plaintiff never raised nor relied upon any federal question. Rather, the entire case was litigated upon the common law of the State of Iowa.

ARGUMENT

1. In This Case There Is No Title, Right, Privilege or Immunity Specially Set Up or Claimed Under Any Statute of the United States and So This Court Does Not Have Jurisdiction of This Matter Under the Provisions of 28 USC 1257(3).

The petition at law filed in the trial court (Pet. A1-A4) alleged in its paragraph 3 that Respondent herein (sometimes hereinafter referred to as IBP) and the United States of America "entered into an agreement" which agreement is really the consent decree referred to in the Petition for a Writ of Certiorari. In paragraph 6 of the petition filed in the trial court it was alleged that "defendant (Respondent herein) breached the agreement". In paragraph 8 of that petition it was alleged that the members of the class "were third party beneficiaries."

Without deciding whether or not the consent decree is "an agreement" under contract law of the State of Iowa, the Supreme Court of Iowa has decided that any agreement between IBP and the federal government "... was not for the direct or primary benefit of plaintiff or his class" and that "any benefits accruing to any class were only incidental, collateral, or consequential"

(Pet. A16). The decision then goes on to discuss the Iowa cases, the texts, and the *Restatement of the Law of Contracts,* all of which support the Court's holding. Incidental to the argument made by Petitioner in the Supreme Court of Iowa, and in the language of its opinion "Plaintiff (Petitioner herein) argues the nature and purpose of the Clayton Act itself accords them (sic) the status he claims." (Pet. A18) And of course the status claimed was that as a creditor beneficiary as a matter of Iowa contract law.

And so we see that the right "set up or claimed" in the trial court and in the Supreme Court was that of a "third party beneficiary" within the meaning of Iowa contract law, and not a right "specially set up or claimed under the . . . statutes . . . of the United States" as is required under the provisions of 28 USC 1257(3), the pertinent language of which is as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, *right,* privilege or immunity *is specially set up or claimed under the* Constitution, treaties or *statutes of,* or commission held or authority exercised under, *the United States.*" (Emphasis supplied)

In this regard, the practice of the United States Supreme Court is to strictly construe statutes authorizing review. This practice was recognized fairly recently

in footnote 1 to the decision in *Fornaris* v. *Ridge Tool Co.*, Puerto Rico 1970. 91 S.Ct. 156, 400 U.S. 41, 27 L. Ed. 2nd 174.

2. The Supreme Court of Iowa Has Not Decided a Federal Question of Substance.

Rule 19(1)(a) of the *Rules of the Supreme Court of the United States,* with respect to review of State Court decisions, is as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Unless the Supreme Court of the United States is to depart from its usual exercise of sound judicial discretion, the Petition for a Writ of Certiorari in this case will not be granted. There are not special or important reasons for the grant of the Writ requested. The Supreme Court of Iowa has not decided a federal question of substance. It has decided only a question of Iowa contract law.

In *Black* v. *Cutter Laboratories,* California, 1956, 76 S.Ct. 824, 351 U.S. 292, 100 L. Ed. 1188 this Court held there was no substantial federal question presented in a case arising in the state courts of California, where a former employee sought reinstatement under a collec-

tive bargaining agreement which authorized discharge for "just cause" only. The grounds for discharge had been that the former employee was an active member of the Communist Party and had falsified her application for employment. The question of waiver was raised and the California Court had held that waiver did not apply and that the former employee had been discharged for "just cause". Against the background of federal labor law and Constitutional questions raised, this Court held that there was no substantial federal question presented. Surely the illusion of questions of federal labor law and constitutional law was much greater in that case than the illusion presented by Petitioner herein simply because the claimed "agreement" happened to be an antitrust consent decree, and the claims asserted under that decree ("agreement") were claims as third-party beneficiaries under Iowa contract law. As the Supreme Court of Iowa noted "Both parties have cited *Olney* (*Olney* v. *Hutt,* 251 Iowa 1379, 105 N.W.2d 515) and the Restatement section it approves." The Supreme Court of Iowa simply decided that the interpretation placed on *Olney* and the *Restatement* by Respondent herein was the correct interpretation. Accordingly, the Supreme Court only decided a question of Iowa contract law.

The statement in the Petition to the effect that "Without such a right of action, the employer may with virtual impunity disregard explicit promises to the Government concerning the employees." (Pet. 6) assumes that neither the Government nor the Court will be diligent in the enforcement of consent decrees, an assumption that Respondent does not believe will be made by the Supreme Court of the United States.

3. The Supreme Court of Iowa Decided Correctly That Petitioner Had No Standing as Third-Party Beneficiary To Recover From Respondent Under the Provisions of the Consent Decree.

The consent decree herein involved provides for the divestiture by Respondent of two of its plants. Also contained therein were further provisions designed to facilitate the accomplishment of the divestiture. Among those provisions is Paragraph IV(C) of the decree which is the provision claimed to have been breached, and which is as follows:

> "Pending any sale pursuant to the terms of this Final Judgment and subject to the provision of this Court's order of October 6, 1969, IBP shall continue the normal operations of Blue Ribbon and shall take no action with respect to the personnel or assets of Blue Ribbon which would impair IBP's ability to accomplish the divestiture ordered in paragraph IV(A)." (Pet. A7)

Petitioner claimed in paragraph 8 of his Petition at Law (under Iowa practice a Petition at Law serves substantially the same function as a complaint in the federal trial courts) that "The members of the class represented by plaintiff were third-party beneficiaries of the agreement (Exhibit A) between the defendant and the United States. As a direct result of the breach of the aforesaid agreement by the defendant the members of the said class suffered damages through lost wages and other benefits of employment." (Pet. A4)

Respondent filed a Motion to Dismiss the Petition at Law for failure to state a cause of action upon which any relief could be granted stating three grounds for the Motion to Dismiss. The ground upon which the Supreme Court of Iowa sustained the Motion was as stated by the Supreme Court of Iowa that "plaintiffs are not entitled to sue as third-party beneficiaries as

the alleged 'agreement' was not for plaintiffs' direct or primary benefit, only their indirect, collateral or consequential benefit, if any." (Pet. A11) The complete text of the Motion to Dismiss is set forth in the Appendix to this Brief. Thus were the issues framed in the trial court and so they remained through the decision by the Supreme Court of Iowa.

As the Petitioner does here, he argued in support of his position that Petitioner was a third-party beneficiary entitled to sue under the "agreement" that "Similar direct actions by employees as third-party beneficiaries of a contract between their employer and the Government have been frequently recognized in other areas." (Pet. 7) In so arguing he relied upon *Hearn* v. *Ralph Sollitt & Sons Construction Co.*, 93 S.W.2d 551 (Tex. Civ. App. 1936); *Fryns* v. *Fair Lawn Fur Dressing Co.*, 114 N.J. Eq. 462, 168 A.862 (1933); and *Brown* v. *Bowers Construction Co.*, 236 N.C. 462, 73 S.E.2d 147 (1952). The Supreme Court of Iowa rejected that argument saying simply "We see nothing in fundamental contract law which aids plaintiff in his claim that his employees, unmentioned (sic) [1] in the contract, were creditor beneficiaries." (Pet. A18)

The Supreme Court of Iowa correctly disposed of those cases in that manner. Respondent has no disagreement with those cases. They were decided under the state law of the states in which they were brought and are in accord with the Iowa law of contracts as it relates to third-party beneficiaries. Each case was decided on the basis that there was *an intent* to benefit the third party. In this case the Supreme Court of

[1] Petitioner suggests that this amounts to a finding that the employees were not mentioned in the contract (consent decree) (Pet. 5, footnote 3). Respondent suggests this is not a finding but that the word "unmentioned" was intended to read "mentioned".

Iowa noted, quoting from 17 *Am. Jur. 2d, Contracts,* section 304, pages 727-730 that:

> "As a general proposition, the determining factor as to the rights of a third-party beneficiary is the intention of the parties who actually made the contract. The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts. Thus it is often stated that the contract must have been intended for the benefit of the third person in order to entitle him to enforce it.
>
> "* * * The intention of the parties in this respect is determined by the terms of the contract as a whole, construed in the light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish.
>
> "Although the above statements are clear enough as broad statements of principle, it is not always clear as to just what is meant when the courts say that there must be an intent to benefit the third person or that the intention of the parties is controlling. * * * A provision in a contract that it was made for the benefit of a third person or that he should have the right to enforce the same would clearly indicate the intention of the parties that the promise should inure to the benefit of the third person. * * * It has been indicated that the contracting parties must have intended to confer an actionable right upon the third person. Moreover, it has been declared that for anyone to be a third-party beneficiary entitled to recover on a contract both parties to the contract must so intend *and must indicate that intention in the contract.* * * * [A] contract will not be construed as having been made for the benefit of a third person unless it clearly appears that such was the intention of the parties. * * * " (Emphasis added) 17 *Am. Jur. 2d, Contracts,* section 304, pages 727-730. (Pet. A18)

Also, as the Petitioner does here, he argued in support of his position that Petitioner was a third-party

beneficiary entitled to sue under the "agreement" that "the nature and purpose of the Clayton Act itself accords them (sic) the status he claims". (Pet. A18). The opinion of the Supreme Court discloses that substantially the same cases cited in the Petition for a Writ of Certiorari were cited to the Supreme Court of Iowa. (Pet. A18) The Supreme Court of Iowa correctly held that:

> "The authorities plaintiff cites do not reach or support the position he takes. They are authority only that the purpose of the Act is to preserve competition in industry sometimes but not always in small units." (Pet. A18)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the unanimous decision of the Supreme Court of Iowa is correct. The petition for writ of certiorari should be denied.

Respectfully submitted,

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June 6, 1974

APPENDIX

IN THE DISTRICT COURT OF IOWA
IN AND FOR CERRO GORDO COUNTY

No. 42939 Law

JOHN B. BAILEY, Individually and as President of Local 1196, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, on behalf of the members of the class composed of employees of the Defendant IOWA BEEF PROCESSORS, INC., at its Mason City, Iowa, plant, *Plaintiff*,

v.

IOWA BEEF PROCESSORS, INC., *Defendant*.

MOTION TO DISMISS AND REQUEST FOR ORAL ARGUMENT

Comes now the Defendant and moves the Court to dismiss the above entitled action because the facts stated therein show that Plaintiff is not entitled to any relief against this Defendant because:

1. The petition shows that this action is brought to enforce or partially enforce a Judgment of the United States District Court for the Northern District of Iowa in which Judgment that Court expressly retained jurisdiction "for the enforcement of compliance" and for other purposes including "construction" or "modification or termination of any of the provisions thereof". For this Court to entertain this action would be to deprive the United States District Court for the Northern District of Iowa of its power to execute its judgment and thereby to impair its jurisdiction. Further this Court of Law should refrain from exercising any control over a Judgment granting equitable relief.

2. If this action be regarded as an action on a judgment it is not prosecuted by the party in whose favor it runs.

3. If the judgment sued upon can be regarded to be an "agreement" as alleged in Plaintiff's petition, the Plaintiff is still not entitled to bring this action as a third-party beneficiary since it clearly appears that such "agreement" was not for the direct or primary benefit of Plaintiff but that the benefits, if any, accruing to Plaintiff were only incidental, collateral, or consequential. *Olney* v. *Hutt,* 251 Iowa 1379, 105 N.W.2d 515 and Section 133, *Restatement of the Law of Contracts,* Chapter 6, page 151, quoted therein.

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REQUEST FOR ORAL ARGUMENT

Defendant hereby requests to be heard on the submission of the foregoing Motions.

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